# THE INCREASED CONTROL OF STATE ACTIVITIES BY THE FEDERAL COURTS

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It has been well said that "The question of the relation of the states to the federal government is the cardinal question of our constitutional system. At every turn of our national development we have been brought face to face with it, and no definition either of statesmen or of judges has ever quieted or decided it. It cannot, indeed, be settled by the opinion of any one generation, because it is a question of growth, and every successive stage of our political and economic development gives it a new aspect, makes it a new question."[1]

The current discussion provoked by the apparently increasing frequency with which the federal judiciary interferes with the enforcement of the legislative will of the states aptly emphasizes the force of this conclusion. Within late years the federal courts have interposed in numerous cases involving state activities and have asserted the power to control such activities under various circumstances. A brief enumeration of some of the most recent instances of this exercise of power will best indicate the frequency and apparent freedom with which it has been resorted to. Thus it has been held that state boards and commissions, attorneys general and prosecuting attorneys may be enjoined from putting into effect a schedule of railroad rates[2] or gas,[3] telegraph[4] or stockyards rates.[5] alleged to

[1] Woodrow Wilson: *Constitutional Government in the United States*, p. 173.

[2] Smyth v. Ames (1898), 169 U. S. 466; Prout v. Starr (1902), 188 U. S. 537; Reagan v. Farmer's Loan & Trust Co. (1894), 154 U. S. 362; Clyde v. Richmond & D. R. Co. (1893), 57 Fed. 436; Chicago, etc., Ry. Co. v. Devy (1888), 35 Fed. 866; Poor v. I. C. Ry. Co. (1907), 155 Fed. 226; Perkins v. No. Pac. Ry. Co. (1907), 155 Fed. 445; R. R. Comsn. of La. v. Texas & P. Ry. Co. (1906), 144 Fed. 68; St. Louis & S. F. R. Co. v. Hadley (1908), 161 Fed. 419; Miss. R. R. Comsn. v. I. C. R. R. Co. (1906), 203 U. S. 335; Cent. of Ga. Ry. Co. v. R. R. Comsn. of Ala. (1908), 161 Fed. 925; So. Ry. Co. v. McNeill (1907), 155 Fed. 772.

[3] Haverhill Gas Light Co. v. Barker et al. (1901), 119 Fed. 694; Cons. Gas Co. v. City of N. Y. (1907), 157 Fed. 849; Lindsley v. Natural Carbonic Gas Co. (1908), 162 Fed. 954.

[4] W. U. Tel. Co. v. Mygatt (1899), 98 Fed. 335.

[5] Cotting v. Kansas City Stockyards Co. (1897), 79 Fed. 679.

be invalid as working a deprivation of property without due process of law or as otherwise violating the federal constitution.[6]

State officers have been restrained from levying taxes on the ground that they were attempting to act without lawful authority.[7] The cancellation or revocation of licenses to do corporate business because of the violation of state law has been enjoined.[8] The enforcement of city ordinances has been prevented[9] and seizure of property under a dispensary law has been restrained.[10] These are but a few of the many instances where the power of the federal courts has been used to stay the operation of state laws and the execution of state policies, as manifested in legislative acts.

Furthermore, it is to be noted that in addition to the cases where purely negative control has been exercised, there are instances of the grant of positive remedies by the federal courts against state or local officers, e. g., in compelling through the writ of mandamus the levy of a tax to pay a judgment on township bonds.[11]

These cases have been confined to no locality; north and south, east and west, have felt the heavy hand of the national government. Nor has such control been restricted to a single field of state law; criminal as well as civil liability to the state has been involved.

At times clashes and serious conflicts between the federal and state authorities seemed imminent in connection with some of these suits and much harsh criticism of the action of the federal courts has been made. An association of attorneys general of various states has memorialized the president and congress for remedial legislation; similar action has been taken by the legislature of Nebraska;[12] the president has made reference to the often expressed discontent over

[6] So. Ry. Co. v. Greensboro Ice & Coal Co. (1904), 134 Fed. 82.

[7] Univ. of South v. the Jetton (1907), 155 Fed. 182; Taylor v. L. & N. R. Co. (1898), 88 Fed. 350.

[8] C. R. I. & P. Ry. Co. v. Swanger (1908), 157 Fed. 783; Metro. L. Ins. Co. v. McNall (1897), 81 Fed. 888; C. R. I. & P. Ry. Co. v. Ludwig (1907), 156 Fed. 152; Mut. L. Ins. Co. v. Boyle (1897), 82 Fed. 705.

[9] Iron Mt. R. Co. v. City of Memphis (1899), 96 Fed. 113; Defiance Water Co. v. City of Defiance (1898), 90 Fed. 753.

[10] Scott v. Donald (1897), 165 U. S. 107. See also Minneapolis Brewing Co. v. McGilvary (1900), 104 Fed. 258.

[11] Graham v. Folsom, 200 U. S. 248. (1906).

[12] Cong. Record, 60th Cong. 1st sess., p. 133.

the situation in a message to congress;[13] and various bills have been proposed and are pending in congress in relation to the matter.

This paper addresses itself to a consideration of whether the recent use of injunctions by federal courts as to state laws is an unwarranted exercise of power over the states by the federal government. It may, at the outset, be conceded that the question is one of great difficulty and that its proper solution is of vast importance in determining the proper relations of the states and the nation in our dual system. Able lawyers, learned publicists and wise judges have disagreed in their conclusions on it, and one may well hesitate before taking a decided stand thereon.

The question became of greatest interest in connection with the case of ex parte Young,[14] decided by the United States supreme court, March 23, 1908. It was there held that the attorney general of Minnesota might be enjoined at the suit of individual stockholders of a railroad from using the state courts to enforce an unconstitutional rate law, which affected the state only in its general welfare.[15] It was vigorously contended that such an action was in effect a suit against a state and therefore within the prohibition of the eleventh amendment to the federal constitution, which forbids the commencement or prosecution of any suit against one of the United States by citizens of another state or by citizens or subjects of any foreign state. There is thus raised the whole question of the suability of a state, and no intelligent discussion of the action of the federal courts in this and similar cases is possible without a thorough understanding of the doctrine of the immunity of the states from suit.[16]

It cannot be denied that there were conflicting views on this in 1787–8. Hamilton in the *Federalist*[17] argued that debts of the states could not be enforced by suit, since "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." Madison and Marshall in the Virginia Convention met

[13] December 3, 1907.

[14] 209 U. S. 123.

[15] For a diametrically opposite view see State v. So. R. Co. (N. C. 1907), 59 S. E. 570.

[16] See address of William D. Guthrie in *Proceedings of New York State Bar Association*, 1908.

[17] Number 81.

the objections of George Mason and Patrick Henry in a similar way. Madison said: "Its jurisdiction (the federal jurisdiction) in controversies between a state and citizens of another state is much objected to, and perhaps not without reason. It is not in the power of individuals to call any state into court. The only operation it can have is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal court. . . . . It appears to me that this (clause) can have no operation but this—to give a citizen a right to be heard in the federal courts; and, if a state should condescend to be a party, this court may take cognizance of it."[18] Marshall, in answer to the same objection, said: "With respect to disputes between a state and the citizens of another state, its jurisdiction has been decried with unusual vehemence. I hope that no gentleman will think that a state will be called at the bar of the federal court. . . . . It is not rational to suppose that the sovereign power should be dragged before a court."[19] On the other hand James Wilson[20] and Edmund Randolph[21] not only thought that such jurisdiction was conferred but that it was wisely conferred.

The concrete question arose in 1793 in the case of Chisholm v. Georgia,[22] where it was held that a state was liable to be sued by a citizen and that a judgment might be rendered against it. Justice James Wilson in his opinion said: "This is a case of uncommon magnitude. One of the parties to it is a state; certainly respectable, claiming to be a sovereign. The question to be determined is, whether this state, so respectable, and whose claims soar so high is amenable to the jurisdiction of the supreme court of the United States? This question, important in itself, will depend on others, more important still; and may, perhaps, be ultimately resolved into one no less radical than this—'Do the people of the United States form a nation?'" In answer to this question Wilson declared: "As to the purposes of the Union . . . . Georgia is not a sovereign state."

Georgia was highly incensed, and the discussion and agitation consequent on the case resulted in the adoption of the eleventh

[18] 3 Elliott's *Debates*, 533.
[19] *Ibid.*, 555.
[20] 4, *Ibid.*, 491.
[21] 3, *Ibid.*, 573.
[22] 2 Dall. 419.

amendment in 1798, declaring that the judicial power should not be construed to extend to suits brought against the states by citizens of other states.

The doctrine of the immunity of a sovereign from suit seems to have been derived from the principles of the Roman Law and the adoption of the monarchical principle that the "sovereign can do no wrong,"[23] and from the laws and practices of our English ancestors.[24] But although the king could not be sued, because no court could have jurisdiction over him, the individual was not without redress. Thus Blackstone says:[25] '—Are then, it may be asked, the subjects of England totally destitute of remedy, in case the crown should invade their rights, either by private injuries or public oppression? To this we may answer, that the law has provided a remedy in both cases.

"And, first, as to private injuries: if any person has, in point of property, a just demand upon the king, he must petition him in his court of chancery, where his chancellor will administer right as a matter of grace though not upon compulsion. . . . . Next, as to cases of ordinary public oppression, where the vitals of the constitution are not attacked, the law hath also assigned a remedy. For as a king cannot misuse his power, without the advice of evil counsellors, and the assistance of wicked ministers, these men may be examined and punished."

Thus from time immemorial the English subject might petition the sovereign that right be done him. Petitions of right as a manner of seeking relief against the king came to be granted practically as a matter of course so that it was said by our supreme court that "It is believed that this petition of right, as it has been practised and observed in the administration of justice in England, has been as efficient in securing the rights of suitors against the crown in all cases appropriate to judicial proceedings, as that which the law affords to the subjects of the king in legal controversies among themselves. 'If the mode of proceeding to enforce it be formal and ceremonious, it is nevertheless a practical and efficient remedy for the invasion by the sovereign power of individual rights.' United States v. O'Keefe, 11 Wall. 178."[26]

[23] Goodnow, *Comparative Administrative Law*, II, 149.

[24] United States v. Lee, 106 U. S. 196.

[25] Book I, pp. 243–4.

[26] United States v. Lee, 106 U. S. 196, 205.

Again the court pointed out [27] that "The English maxim does not declare that the government or those who administer it, can do no wrong; for it is a part of the principle itself that wrong may be done by the governing power, for which the Ministry for the time being is held responsible."

In the case of Feather v. Queen[28] Lord Chief Justice Cockburn declared that "no authority is needed to establish that a servant of the crown is responsible in law for a tortious act done by the authority of the crown, a position which appears to us to rest on principles which are too well settled to admit of question and which are alike essential to uphold the dignity of the crown on the one hand and the rights and liberties of the subject on the other."

The English courts had long exercised control over officers, and all the great prerogative writs like prohibition, mandamus, habeas corpus and quo warranto were issued against administrative and judicial officers.[29] And at the time of the adoption of our constitution the court of chancery had full power to restrain an officer of the crown from doing irreparable injury to property rights.

The English law then recognized the liability of officers to suits by individuals whose rights had been violated, and distinguished between such suits and those against the crown. In view of this it is significant that the eleventh amendment forbids suits against states, but not against officers of states. Hamilton in the *Federalist*[30] expressly laid down the doctrine that the federal courts would be empowered to set aside state laws in conflict with the federal constitution, in these words:

"What would avail restrictions on the authority of the state legislatures, without some constitutional mode of enforcing the observance of them? The states . . . . . are prohibited from doing a variety of things, some of which are incompatible with the interests of the Union, and others with the principles of good government. The impositions of duties on imported articles, and the emission of paper money, are specimens of each kind. No man of sense will believe that such prohibitions would be scrupulously regarded, without some effect-

[27] Langford v. U. S., 101 U. S. 341, 343.
[28] Feather v. Queen (1865), 6 B. & S. Q. B. 257, 297.
[29] Goodnow, *Principles of the Administrative Law of the United States*, 420 *et seq.*
[30] Number 80.

ual power in the government to restrain or correct the infractions of them. This power must either be a direct negative on the state laws, or an authority in the federal courts to overrule such as might be in manifest contravention of the articles of Union. There is no third course that I can imagine."

He thus clearly foresaw that power to enforce the prohibitions against the states must reside somewhere in the federal government and preferably in the courts.

What, then, has been the course of the supreme court with reference to this question? That an unconstitutional act is null and void and that it is the duty of the courts so to declare when a proper suit arises between proper parties is thoroughly settled. Said Chief Justice Marshall in Marbury v. Madison:[31] "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution, if both the law and the constitution apply to a particular case, so that the court must decide the case conformably to the law, disregarding the constitution, or conformably to the constitution, disregarding the law: the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty."

The state courts have exercised this power repeatedly as to state laws and have issued injunctions against state officers to restrain enforcement of such laws, where irreparable injury would result.[32] Why should not the federal courts have the same power within the sphere of their jurisdiction? The federal constitution can be preserved only by declaring state legislative acts which are repugnant to it null and void.[33] In cases of equitable cognizance involving such acts, e. g., if a multiplicity of suits will be prevented, or if irreparable injury would otherwise result, or if there is no adequate remedy at law, a writ of injunction is necessary and proper to preserve the *status quo* and to protect the rights of the parties.

[31] 1 Cranch, 177.

[32] 22 Cyc. 884; State v. Cunningham, 81 Wis. 440.

[33] Cohens v. Virginia, 6 Wheat., 264, 414.

Injunctions have long been issued by United States courts to restrain operation of state laws, and there is in that act alone no novel exercise of federal jurisdiction. In 1824 in the case of Osborn v. Bank of the United States[34] it was held that the auditor of the state of Ohio could be enjoined from placing the money of the bank which he had seized, in the treasury of the state, under authority of an alleged law that was in fact unconstitutional and void, because an interference with an instrument of the federal government. The contention was there made that this was in effect a suit against a state and therefore within the prohibition of the eleventh amendment, but it was held that the amendment applied only to those suits in which a state was a party on the record, and the state not being named here as a party, the amendment did not apply. This test of when a state is to be regarded as a party was later modified in Georgia v. Madrazo[35] and again in ex parte Ayers,[36] where it was declared that the court will not be limited entirely by the names of the parties of record in determining who is the real party in an action. But the doctrine of the Osborn case as to injunctions by federal courts against the execution of unconstitutional state laws has been adhered to and enforced again and again.[37] In Pennoyer v. McConnaughy[38] it was said: "The general doctrine of Osborn v. Bank of the United States, that the circuit courts of the United States will restrain a state officer from executing an unconstitutional statute of the state, when to execute it would be to violate rights and privileges of the complainant which had been guaranteed by the constitution and would work irreparable damage and injury to him, has never been departed from."

These cases are based upon the common law rule that an officer, not a judge of a higher court, is liable for every act in excess of jurisdiction; that the excess of jurisdiction which will cause the liability may result from the attempt to enforce a statute which is regarded

[34] 9 Wheat., 738.

[35] 1 Pet. 110, 124.

[36] 123 U. S. 443.

[37] Smyth v. Ames, 169 U. S. 466; Reagan v. Co., 154 U. S. 362; Prout v. Starr, 188 U. S. 537; In re Tyler, 149 U. S. 164; Pennoyer v. McConnaughy, 140 U. S. 1; Scott v. Donald, 165 U. S. 58; Tindal v. Wesley, 167 U. S. 204; Gunter v. Atl. Coast Line, 200 U. S. 273.

[38] 140 U. S., 1, 9.

by the courts as unconstitutional; and that there is in addition some ground of equitable cognizance, such as threatened irreparable injury.[39]

If the act which the state officer seeks to enforce be a violation of the federal constitution, the officer comes into conflict with the superior authority of that constitution and is stripped of his official character and is subjected to the consequences of his individual conduct.[40] The state is not the real party, since it cannot have authorized the threatened illegal acts and cannot shelter the wrongdoer.[41] He is but an individual tort-feasor.

The court said in Poindexter v. Greenhow[42] as to an unconstitutional law: "That, it is true, is a legislative act of the state of Virginia, but is it not a law of the state of Virginia. The state has passed no such law, for it cannot; and what it cannot do it certainly in contemplation of law has not done."

The limits of this paper will not permit a review of the many cases in which has been discussed the question of when a state is a party to a suit within the meaning of the eleventh amendment. It is not easy to reconcile all the decided cases, though a careful analysis of them will show more consistency than might appear from a careless reading.[43] The rule was stated by Mr. Justice Gray in Belknap v. Schild as follows:

"In a suit in which the state is neither formally or really a party its officers, although acting by its order and for its benefit, may be restrained by injunction, when the remedy at law is inadequate, from doing positive acts, for which they are personally and individually liable, taking or injuring the plaintiff's property, contrary to a plain official duty requiring no exercise of discretion and in violation of the constitution or law of the United States. . . . . But no injunction can be issued against officers of a state to restrain or control the use of property already in the possession of the state, or money in its treasury when the suit is commenced, or to compel the state to conform its obligations; or where the state has otherwise such an interest in the object of the suit as to be a necessary party."

[39] 29 Cyc. 1441.

[40] In re Ayers, 123 U. S. 444, 507.

[41] Pennoyer v. McConnaughy, 140 U. S. 1.

[42] 114 U. S. 270, 288.

[43] See *Harvard Law Review*, 20:246; 21: 527. *Columbia Law Review*, 7: 609–11.

Mr. William D. Guthrie has recently suggested that the eleventh amendment would be satisfied if we give the state the immunity of the crown.[44] Its officers would still be liable as responsible principals, thus affording individuals in this country the protection of the rights enjoyed by Englishmen. Under our theory of government an unconstitutional statute cannot legalize and equity should give its preventive relief when a threatened act would irreparably injure the plaintiff.[45]

It is apparent that, if when sued in such cases as ex parte: Young, state officers can hide behind the eleventh amendment, the fourteenth amendment is rendered practically nugatory in its prohibitions against the states. The interesting question is thus raised of the effect of the latter upon the former.

It was suggested in the argument of the Young case that it is "not so important to know what the constitution of the United States meant when the eleventh amendment became a part of it as it is to know what that instrument has meant since the fourteenth amendment became effective." The question is whether, if a state legislature passes an act that contravenes the provisions of the fourteenth amendment, prohibiting legislation which operates to deprive a person of life, liberty or property without due process of law, or denies to any person the equal protection of the laws, courts of equity have jurisdiction to restrain state officers from enforcing such legislation . . . . . whether such a suit is a suit against the state.

Justice Shiras touched upon this in Prout v. Starr,[46] where he said: "The constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity. It would, indeed, be most unfortunate if the immunity of the individual states from suits by citizens of other states, provided for in the eleventh amendment, were to be interpreted as nullifying those other provisions which confer power on congress to regulate commerce among the several states, which forbid the states from entering into any treaty, alliance or confederation, from passing any bill of attainder, *ex post facto* law or law

[44] *Proceedings of New York State Bar Association*, 1908, p. 220.

[45] Virginia Coupon Cases. . . .Allen v. B. & O. R. R., 114 U. S. 311; Scott v. Donald, 165 U. S. 107; Mechem, Public Officers, § 995.

[46] 188 U. S. 537, 543.

impairing the obligation of contracts, or without the consent of congress from laying any duty of tonnage, entering into any agreement or compact with other states, or from engaging in war. . . . . all of which provisions existed before the adoption of the eleventh amendment, which still exist, and which would be nullified, and made of no effect, if the judicial power of the United States could not be invoked to protect citizens affected by the passage of state laws disregarding these constitutional limitations. Much less can the eleventh amendment be successfully pleaded as an invincible barrier to judicial inquiry whether the salutary provisions of the fourteenth amendment have been disregarded by state enactments."

In General Oil Co. v. Crain[47] Mr. Justice McKenna speaks of "the error, which appears with a kind of periodicity, varied in presentation, to accommodate the particular exigency, that a state is inevitably brought into court when the execution of its laws is arrested by a suit against its officers. It seems to be an obvious consequence that as a state can only perform its functions through its officers, a restraint upon them is a restraint upon its sovereignty from which it is exempt without its consent in the state tribunals, and exempt by the eleventh amendment of the constitution of the United States, in the national tribunals. The error is in the universality of the conclusion, as we have seen. Necessarily to give adequate protection to constitutional rights a distinction must be made between valid and invalid state laws, as determining the character of the suit against state officers. And the suit at bar illustrates the necessity. If a suit against state officers is precluded in the national courts by the eleventh amendment to the constitution and may be forbidden by a state to its courts, as it is contended in the case at bar that it may be, without power of review by this court, it must be evident that an easy way is open to prevent the enforcement of many provisions of the constitution, and the fourteenth amendment, which is directed at state action could be nullified as to much of its operation. . . . . Zeal for policies, estimable as it may be, of themselves, may overlook or underestimate private rights. The swift execution of the law may seem the only good, and the rights and interests which obstruct it be regarded as in a kind of outlawry."

[47] 209 U. S. 211, 226.

The majority of the court in the Young case expressly refused to examine or decide the question whether the adoption of the fourteenth amendment in any way altered or limited the effect of the eleventh amendment.[48] But Mr. Justice Harlan, dissenting, expressly holds that "the eleventh amendment has not been modified in the slightest degree as to its scope or meaning by the fourteenth amendment and a suit which, in its essence, is one against the state remains one of that character, and is forbidden even when brought to strike down a state statute alleged to be in violation of that clause of the fourteenth amendment forbidding the deprivation by a state of life, liberty or property without due process of law."[49]

Though the court may never hold that the fourteenth amendment in itself in any way altered the eleventh amendment, there remains the possibility that congress might confer on the courts jurisdiction against state officers where they were about to violate the later amendments, under the power therein granted congress to enforce their provisions by appropriate legislation.

In Fitts v. McGhee[50] the court practically held that where state officers were not expressly directed to enforce a statute, alleged to be unconstitutional, a suit against them to restrain its enforcement was in effect a suit against the state. This illogical distinction was quickly taken up by many of the state legislatures and in framing acts regulative of railroad rates care would be taken not to charge any officer specially with their enforcement. Stringent penal provisions to be enforced through the criminal laws would then be added and it was thought in this way that federal injunctions could be avoided.

Such was the situation in the Young case[51] where the Minnesota rate law was cunningly framed with an express provision that no duty should rest upon the railroad and warehouse commission to enforce any rates specifically fixed by any statute of the state. Thus it was thought to prevent suits against the commission or the attorney general under the doctrine of the Fitts case. The state could

[48] 209 U. S. 150
[49] 209 U. S. 182.
[50] 172 U. S. 516.
[51] 209 U. S. 123.

not be sued, eo nomine, under the eleventh amendment. Then apparently the validity of the act could be tested only by disobedience and defense in a criminal suit. But that avenue of approach to the courts was practically closed by provision for penalties which it is said would have amounted to several hundred million dollars in one month. Each violation of the freight act was punishable by imprisonment for ninety days. Disobedience of the passenger rate act was punished by a fine not exceeding $5000 or imprisonment not exceeding five years, or both fine and imprisonment, the sale of each ticket being a separate offense.

Besides this, the act provided that any officer, director, agent or employee of a railroad company, who caused or *counseled, advised* or assisted any such company to violate the act, should be guilty of a misdemeanor and might be prosecuted in any county into which the railroad extended and in which it had a station.

Thus the railroad attorneys could not even in good faith advise their companies that the commodity rates were non-compensatory or confiscatory, without liability of being tried in the most remote county of the state and there being imprisoned in the county jail for a period not exceeding ninety days, which was the only punishment under this section.

The court well said: "The necessary effect and result of such legislation must be to preclude a resort to the courts (either state or federal) for the purpose of testing its validity. The officers and employees could not be expected to disobey any of the provisions of the acts or orders at the risk of such fines and penalties being imposed upon them, in case the court should decide that the law was valid. The result would be a denial of any hearing to the Company." Thus it would be deprived of the equal protection of the laws.

The court was obliged to modify if not overrule the Fitts case with respect to the distinction that state officers may not be enjoined unless they are specially charged. It was held that if the officer had by virtue of his office some connection with the enforcement of the act he might be enjoined, though not specially so charged in the act itself. From the standpoint of the plaintiff's rights, it can make no difference whether they are being infringed by one having a supposed special duty or merely a general duty to attack them.

That this distinction in the Fitts case was illogical will be apparent on a moment's reflection. It amounts to this: If a state legislature itself exercises its discretion and specifically declares a state officer shall execute an unconstitutional statute, then the officer may in a proper case be enjoined from instituting the suit, and it will not be regarded as a suit against the state. But if the state legislature, instead of itself exercising that discretion, delegates it to the state officer to allow him to decide whether he shall or shall not institute such judicial proceeding, then no matter how clearly it may appear that the officer is about to institute such proceeding, he is exempt from injunction and suit because he is vested with a discretion. In other words, as was pointed out to the court, "the delegated discretion is an absolute barrier to the remedy, whereas the discretion exercised by the legislature itself simply paves the way for the remedy."

Conceding that the court cannot control the exercise of the discretion of an officer, it was held that an injunction to prevent him from doing that which he has no legal right to do is not an interference with the discretion of an officer. There can be no discretionary power to enforce an act, which in contemplation of law does not exist.

The court had held in Davis & Farnum Manufacturing Company v. Los Angeles[52] and in Dobbins v. Los Angeles[53] that where irreparable injury will be inflicted on property rights through a void law or ordinance, an injunction will issue to restrain its enforcement by criminal proceedings, and the earlier case of Smyth v. Ames[54] had enjoined proceedings by indictment to compel obedience to the Nebraska rate act; so that in applying the remedy of injunction to criminal as well as civil cases, upon the usual grounds of equitable jurisdiction, the Young case established no new precedent.

May we, then, not conclude that in its protection of legal rights against unwise and unjust provisions in the Minnesota rate legislation, in its reassertion of the supremacy of federal power and its enforcement of the constitutional guarantees of the fourteenth amendment, there is, as Mr. Justice Peckham said, nothing in the Young case

[52] 189 U. S. 218.
[53] 195 U. S. 223.
[54] 169 U. S. 466.

"that ought properly to breed hostility to the customary operation of federal courts of justice in cases of this character?"

The annual output of American legislatures is said to be 15,000 laws. Over legislation and bad legislation are crying evils of the times. With states legislatures dealing with new and complicated legal and economic problems, usually without expert knowledge or experience, and with much popular (and often proper) hostility to great corporations, it is not strange that many defective and illegal acts are passed. The courts, both state and federal, are busily engaged in separating the wheat from the chaff. Of necessity and of right many acts are thus held unconstitutional and their enforcement prevented. Is it not possible that in unscientific methods of state legislation and in unjust unconstitutional enactments, drafted to appease popular clamor, rather than in judicial usurpation, is to be found the reason for much of the apparent increased control of state activities by the federal courts?

De Tocqueville, writing in 1832, said: "If the sovereignty of the Union were to engage in a struggle with that of the states at the present day its defeat may be confidently predicted; and it is not probable that such a struggle would be seriously undertaken. As often as steady resistance is offered to the federal government, it will be found to yield."

Happily, this prophecy did not come true, and that it was not fulfilled is due in no small measure to the jealous way in which the federal courts have safeguarded the authority and powers of the national government, of which the Young case is a conspicuous example. To have decided that case otherwise would have been in effect to limit the fourteenth amendment so as to make it read: No state shall deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws, *unless it shall pass an act for that purpose, in which case the prohibitions of this amendment shall not be operative.*